STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

Judges Kirsten Frank Kelly, P.J., and Douglas B. Shapiro and Amy Ronayne Krause, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appelleant

-vs-

THABO JONES,

Defendant-Appellee.
_____/

Supreme Court No. 147735

Court of Appeals No. 312966

Lower Court No. 12-003749-FH

BRIEF OF THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE THABO JONES

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STATEMENT OF JURISDICTION

Amicus agrees with the Statement of Jurisdiction included in Defendant-Appellee's brief to this Court.

STATEMENT OF QUESTIONS PRESENTED

I. **SHOULD THE BAN ON JURY INSTRUCTIONS ON MOVING VIOLATION CAUSING DEATH** [MCL 257.601D(1)] **IN A TRIAL CHARGING RECKLESS DRIVING CAUSING DEATH** [MCL 257.626(4)], **CONTAINED IN** MCL 257.626(5), **BE VACATED, AS IT IS A PROCEDURAL RULE OF LAW THAT IS WITHIN THE EXCLUSIVE JURISDICTION OF THE JUDICIAL BRANCH OF MICHIGAN GOVERNMENT, AND/OR THE STATUTORY BAN ON JURY CONSIDERATION OF THIS NECESSARILY INCLUDED OFFENSE IMPERMISSIBLY INTERFERES WITH A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT TO JURY TRIAL AND GIVES THE PROSECUTION AN UNDUE STRATEGIC ADVANTAGE?**

Court of Appeals answers, "Yes".

Defendant-Appellee answers, "Yes".

Amicus answers, "Yes".

STATEMENT OF FACTS

Amicus agrees with and incorporates the Statement of Facts included in Defendant-Appellee's Brief to this Court.

I. THE BAN ON JURY INSTRUCTIONS ON MOVING VIOLATION CAUSING DEATH [MCL 257.601D(1)] IN A TRIAL CHARGING RECKLESS DRIVING CAUSING DEATH [MCL 257.626(4)], CONTAINED IN MCL 257.626(5), SHOULD BE VACATED, AS IT IS A PROCEDURAL RULE OF LAW THAT IS WITHIN THE EXCLUSIVE JURISDICTION OF THE JUDICIAL BRANCH OF MICHIGAN GOVERNMENT, AND/OR THE STATUTORY BAN ON JURY CONSIDERATION OF THIS NECESSARILY INCLUDED OFFENSE IMPERMISSIBLY INTERFERES WITH A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT TO JURY TRIAL AND GIVES THE PROSECUTION AN UNDUE STRATEGIC ADVANTAGE.

Standard of Review:

The applicable appellate standard of review for an issue raising the validity of legislation is *de novo*. See *People v Houstina*, 216 Mich App 70; 549 NW2d 11 (1996).

Argument:

In the grant of leave to appeal in this matter, this Court has asked the parties and amici to address three issues concerning MCL 257.626(5)– 1) whether a legislative provision barring consideration of a necessarily included lesser offense violates the separation of powers doctrine of Const 1963, art 3, § 2) whether this provision violates a defendant's right to a jury trial by foreclosing a jury instruction on a lesser offense; and 3) whether MCL 257.601d is a necessarily included lesser offense of MCL 257.626(4). Amicus, an organization of criminal defense attorneys in Michigan, supports the answers to all three of these questions contained in the brief filed on behalf of Defendant-Appellee Thabo Jone., and urges this Court to strike down the restriction on jury instructions on the lesser included offense of MCL 257.601d enacted in MCL 257.626(5).

A. Necessarily included lesser offense:

As both parties are in agreement that the offense of moving violation causing death [MCL 257.601d(1)] is a necessarily included lesser offense of reckless driving causing death [MCL257.626(4)], as it is legally impossible to commit the charged act without also committing the lesser offense, no further argument will be made here as to that question. As a necessarily included lesser offense, a jury instruction on that offense is not barred under *People v Cornell*, 466 Mich 335 (2002), and thus would be permissible, if the evidence would support a jury guilty verdict on that offense, but for the specific ban on that instruction set forth in MCL 257.626(5).

B. Separation of Powers:

Amicus fully agrees with and endorses the arguments made by Defendant-Appellee in his Brief to this Court on the question of whether the enactment of MCL 257.626(5) violates the constitutional separation of powers doctrine set forth in Const 1963, art 3, sec 2. This Court should hold that the judicial branch of government has the exclusive authority to regulate the procedures by which a trial judge presents the applicable verdict options to a jury, or considers during a bench trial. The provision in 626(5), which singles out the necessarily included offense of moving violation causing death and bans a guilty verdict on that lesser offense only in jury trials where reckless driving causing death is the charged offense, is a procedural rule that is outside the valid purview of legislative authority. That provision does not make any substantive change in the law, and does not alter the essential elements nor mens rea requirements of either offense, but rather only restricts a jury's options in this specific and individual corner of Michigan criminal procedure. While Amicus asserts that this particular restriction is improper, impermissibly interferes with a defendant's constitutional right to a jury trial, and gives the

prosecution an unfair strategic advantage over the defense in these cases,[1] if such a restriction is permissible it can be adopted only by this Court.

While it cannot be denied that in *People v Cornell, supra,* this Court did write that determining what charges a jury may consider does not concern merely the judicial dispatch of litigation, and that MCL 768.32(1) concerns a matter of substantive law,[2] that language, referring to the general law on lesser included offenses, should not be expanded to permit the Legislature to cherry-pick a specific necessarily included offense to fall outside the scope of (1). If this power is found to reside in the legislative branch, the end result may be a confusing and illogical hodge-podge of rules and restrictions on lesser offense consideration in jury and/or bench trials. While the particular motivation for the Legislature to enact MCL 257.626(5) may not be known or, even if known, relevant to this Court's decision, upholding that restriction would open the flood gates for the Legislature to enact further such restrictions based on negative public reactions to particular publicized cases or individual disagreements by legislators to the verdicts in such cases. The procedural law in Michigan on the right to instructions on lesser included offenses, and when a trial judge is obligated to instruct on such offenses at the requests of a party, as set forth in *Cornell, supra*, should not be subject to the whims of a Legislature often acting in response to the changing winds of public opinion or outrage, focused on the particulars of a individual case, without due consideration of the impact on the law in general or the foreseeable ramifications of that legislation on other cases.

The logical end result of Plaintiff-Appellant's position in this matter is that the Legislature, having the authority under art 3, sec 2 to control **all** aspects of included offense law in Michigan, could elect to rescind MCL 768.32(1) entirely. According to Plaintiff's logic, that

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[1] See subsection C, *infra.*
[2] 466 Mich at 353.

legislative enactment would then have to be enforced by this Court to ban instructions on lesser included offenses in jury trials, or consideration by trial judge sitting as finders of fact at bench trials, in all trials, on all charges, regardless of the particular facts or theories presented by the parties. Such a ruling would result in a plethora of cases that end up in verdicts that fail to satisfy either the interests of the parties themselves or generally the interests of justice. Juries, even given the proper instructions on the burden of proof and the elements of the particular charged offense, may either convict a defendant where there is a substantial doubt as to the proofs on a disputed element, not wanting to acquit a defendant who has clearly committed serious criminal conduct, or acquit a defendant who has admitted commission of such conduct but denies that the more serious charged offense occurred. Neither result complies with the fundamental goals of a trial to seek the truth and render appropriate justice.[3] The power and exclusive authority of the finder of fact to determine the facts and apply them to the law – the full law – would be unduly limited.

It is wrong to presume that if the Legislature rescinded MCL 768.32(1) in its entirely, no right to lesser included offenses in Michigan would exist. This Court in *Cornell, supra,*

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[3] In the amicus brief submitted to this Court by the Michigan Attorney General in this matter, it is claimed that the Legislature enacted MCL 257.626(5) to "protect prosecutors from losing the ability to obtain a more serious conviction for a defendant's gross negligence where it results in the death of another." Amicus Brief of Attorney General at 6. That claim is absurd. The restriction on jury instructions on moving violation causing death does not change the elements of reckless driving causing death, nor does it in any way limit or eliminate the prosecution's ability to obtain a conviction on that greater charge if all of those elements are proven beyond a reasonable doubt. Prosecutors do not need, nor deserve, protection from the Legislature for their right to charge and/or convict on an offense they believe is justified under the evidence. Mr. Jones is not claiming in this interlocutory appeal that the prosecution cannot prove the charge of reckless driving causing death, or should not be able to submit that charge to a jury if constitutionally sufficient evidence of that offense is presented in the case-in-chief. He is only asserting that if the distinguishing element between the charged offense and the necessarily included offense is sufficiently put into issue by that same evidence, the jury, and not the Legislature, must make the ultimate determination of which offense, if any, was committed.

recognized that at common law there was a right to instructions on what are currently defined as necessarily included offenses, and that the predecessor statute to MCL 768.32(1)[4] codified that common law rule:

> In *Hanna [Hanna v People*, 19 Mich 316 (1869)], the defendant was charged with assault with intent to kill. An issue before the Court was whether the trial court erred in instructing the jury that if it did not find the defendant guilty of the offense charged in the information, it might find the defendant guilty of simple assault and battery, which was a misdemeanor. In addressing the issue, this Court first discussed the general common-law rule, stating:
>
> > The general rule at common law was, that when an indictment charged an offense which included within it another less offense or one of a lower degree, the defendant, though acquitted of the higher offense, might be convicted of the less.

466 Mich at 342.

Accordingly, unless specifically negated by any rescinding legislation, if 768.32(1) was eliminated the common law rule would again apply. Under the common law, there would be no comparable restrictions to jury instructions on an offense-by-offense basis. The statutory right to jury consideration of necessarily included lesser offenses, now codified in 768.32(1), did not arise solely out of creation of substantive law by the Legislature in 1846, but was part of Michigan law prior to any statutory enactment. The judicial branch's authority to construe and apply the common law, in the absence of legislative mandate, demonstrates that this area of law is not, and should not, be within the power of the Legislature.

The United States Supreme Court has recognized that rules governing what elements of a criminal offense must be presented to a jury for resolution can be a matter of procedure, and not substance. In *United States v Gaudin*, 515 US 506; 115 S Ct 2310; 132 L Ed 2d 444 (1995), the

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[4] 1846 RS, ch 16, sec 16.

Court considered the validity of a jury instruction, in a case charging perjury, that the essential element under 18 USC, sec 1001 that the false statement be "material" to the relevant government inquiry is matter to be determined by the court rather than the jury. The Supreme Court, finding that the constitutional right to jury trial encompasses the right to have the jury, rather than a court, reach the requisite finding of guilty to a criminal charge, held that instruction to be reversible error, and that the essential element of materiality must be submitted to the jurors. In so deciding, the Court specifically held this rule was procedural in nature, as it did not change the nature of the conduct subject to the criminal provision:

> We do not minimize the role that *stare decisis* plays in our jurisprudence.* * * That role is somewhat reduced, however, in the case of a **procedural rule such as this,** which does not serve as a guide to lawful behavior. See *Payne v. Tennessee,* 501 U.S. 808, 828; 111 S. Ct. 2597, 2609-2610; 115 L. Ed. 2d 720 (1991). It is reduced all the more when the rule is **not only procedural** but rests on an interpretation of the Constitution.

515 US at 521. (Citations omitted). (Emphasis added).

In *Gaudin*, the question was what essential elements of a criminal charge must be submitted to a jury during a trial for the jurors to make the ultimate decision on guilt. Similarly, in the case at bar, the question is whether the Legislature can bar a jury, when the charged offense is reckless driving causing death, from considering whether one of the essential elements – the degree of unlawful driving – has been proven beyond a reasonable doubt where the other elements – that the driving caused a death, are beyond dispute. As in *Gaudin*, the question does not change what conduct is covered by which statute, but instead only relates to submission of

the elements of the statutes to the jury.[5] The Supreme Court found that question procedural rather than substantive, even though it went to the fundamental constitutional issue of the right to jury trial. Here, the specific exception to the general rule of MCL 768.32(1) is also a matter of procedure, impacting on the right to jury trial. As in *Gaudin, supra*, a defendant's right to have the jury rule on the proofs concerning the elements of the offenses should not be subject to legislative control.

For the purposes of this case, which concerns, as acknowledged by both the defense and prosecution, a necessarily included offense, there is no need for this Court, as asserted in Plaintiff's brief, to overrule *Cornell, supra,* in order to affirm the Court of Appeal's opinion below. The question of whether a defendant is or should be entitled to instructions on cognate included offenses, on either state law or constitutional grounds, is not presented or relevant to this decision. If MCL 257.626(5) is vacated, the *Cornell* decision will still apply to require instructions on moving violation causing death only in trials where the uncommon element between the greater and lesser offense is actually disputed at trial, and the evidence could reasonably support a verdict that only the lesser offense occurred.

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[5] The reliance by the prosecution in this matter on the opinions of this Court in *McDougall v Shantz*, 461 Mich 15 (1999); and *People v Watkins*, 491 Mich 450 (2012), is misplaced. Those decisions are distinguishable from the matter at issue in the case at bar. In both *McDougall* and *Watkins*, this Court dealt with whether it was a violation of the separation of powers doctrine for the Legislature to pass statutes dealing with the admissibility and/or use to which the jury could put certain evidence (qualifying an expert in medical malpractice actions, use of prior acts of sexual abuse to show propensity in child assault cases). This Court held these matters to be substantive, and thus within the authority of the Legislature, because they changed the substance and/or substantive use of evidence available to a jury. In the instant case, nothing about the restriction on jury instructions under MCL 257.601d(1) has any impact or change on the admissibility of evidence in a prosecution under 257.626(4), nor does it alter the trial court's obligation to instruct on the use to be put to that evidence. There will be no change to the presentation of evidence in the case, nor to the range of evidence available to either party. Instead, the only change is to the ability of the jury to consider any offense shown by that evidence other than the charged crime. That change is procedural in nature.

This Court should find that MCL 257.626(5) concerns a procedural matter that is exclusively within the constitutional authority of the courts, not the Legislature. That subsection of the statute should be vacated as a violation of the separation of powers doctrine, and the opinion of the Court of Appeals that Mr. Jones may be entitled to an instruction on that lesser offense at his upcoming trial should be affirmed.

C. Right to Trial by Jury:

In MCL 257.626(5), the Legislature has stated that "in a prosecution under subsection (4) [reckless driving causing death, a felony punishable by not more than 15 years in prison, a fine of not less than $2,500 nor more than $10, 000, or both], the jury shall not be instructed regarding the crime of moving violation causing death[6]." The statutory provision does not, however, expressly bar a verdict under MCL 257.601d(1) at a bench trial, with the judge as the finder of fact.

The omission of an explicit bar on a conviction on the lesser misdemeanor offense of moving violation causing death at a bench trial, as compared to a jury trial, is significant. The Legislature is presumed to mean what they say in the express language of a statute, particularly where different language has been used in closely comparable statutes. See *State Treasurer v Snyder*, 294 Mich App 641, 645 (2011). For example, in MCL 768.32(2), the specific legislative exception to the general rule on included offenses in (1) of that statute, the Legislature explicitly barred convictions under the Controlled Substances Act for lesser offenses which are not statutorily defined as "major controlled substances offense," where the charged offense is also defined as a "major controlled substance offense," in **either** a jury or bench trial:

[6] MCL 257.601d(1). This offense is a misdemeanor, punishable by a term not more than one year in jail, a fine not more than $2,000, or both.

> Upon an indictment for an offense specified in section 7401(2)(a)(i) or (ii) or section 7403(2)(a) (i) or (ii) of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.7401 and 333.7403 of the Michigan Compiled Laws, or conspiracy to commit 1 or more of these offenses, **the jury, or judge in a trial without a jury,** may find the accused not guilty of the offense in the degree charged in the indictment but may find the accused guilty of a degree of that offense inferior to that charged in the indictment only if the lesser included offense is a major controlled substance offense. A jury shall not be instructed as to other lesser included offenses involving the same controlled substance nor as to an attempt to commit either a major controlled substance offense or a lesser included offense involving the same controlled substance. The jury shall be instructed to return a verdict of not guilty of an offense involving the controlled substance at issue if it finds that the evidence does not establish the defendant's guilt as to the commission of a major controlled substance offense involving that controlled substance. **A judge in a trial without a jury shall find the defendant not guilty of an offense involving the controlled substance at issue if the judge finds that the evidence does not establish the defendant's guilt as to the commission of a major controlled substance offense involving that controlled substance.**

(Emphasis added).

In the general rule under MCL 768.32(1), the Legislature similarly applies that rule to both jury and bench trials:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, **the jury, or the judge in a trial without a jury**, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense. (Emphasis added).

The fact that the Legislature, in enacting MCL 257.626(5), did not expressly apply the bar on convictions under 257.601d(1) to bench trials as well as jury trials must be seen as an intentional and deliberate decision to apply that bar to only jury consideration of this lesser offense. As shown above, the Legislature clearly knows how to, and has, create an exception to the general rule under 768.32(1) which applies to both jury and bench trials.

This Court should find, even if the Court otherwise upholds the authority of the Legislature to enact 257.626(5) as a substantive rather than procedural rule, that the limitation of that subsection to only jury trials is invalid as it improperly intrudes upon the constitutional right of a criminal defendant to a jury trial[7], and violates due process[8] in that it affords the prosecution an unfair and preferential strategic advantage over the defense.

Under Michigan law, a criminal defendant's ability to waive the constitutional right to a jury trial, and have the judge become the finder of fact at a bench trial, is subject to prosecutorial veto:

> In all criminal cases arising in the courts of this state the defendant may, **with the consent of the prosecutor** and approval by the court, waive a determination of the facts by a jury and elect to be tried before the court without a jury.

MCL 763.3(1). (Emphasis added). This Court has held that the requirement that the prosecution consent to a bench trial, standing alone, does not violate due process. *People v Kirby*, 440 Mich 485 (1992). The *Kirby* Court held that while a defendant has a constitutional right to a jury trial under art 1, sec 17 of the Michigan Constitution, there is no concurrent constitutional right to waive a jury trial, and thus the Legislature can statutorily restrict the conditions upon which waiver can occur.

It is acknowledged that in *Kirby, supra,* this Court rejected a defense argument that it impermissible to permit the prosecution to veto a defense request for a bench trial, in that the prosecution in a particular case may seek to "forum shop" by either agreeing to or refusing to agree to a defense request for a bench trial based upon the particular judge in the case:

> Defendants also contend that the requirement of prosecutorial consent is a grant of arbitrary power to the state. Prosecutors will be allowed to "forum shop," essentially peremptorily challenging a

[7] US Const, Amend VI; Const 1963, art 1, sec 20.
[8] US Const, Amend XIV; Const 1963, art 1, sec 17.

> judge who is otherwise qualified to hear the case. We do not agree. Speculated abuse of power properly granted by the Legislature does not invalidate an otherwise legitimate statute. A valid statute is not rendered unconstitutional solely because those charged with its administration may improperly administer it. *Rassner v Federal Collateral Society,* 299 Mich 206; 300 NW 45 (1941); *SEMTA v Secretary of State*, 104 Mich App 390; 304 NW2d 846 (1981). Moreover, arguments that a statute is unwise or results in bad policy should be addressed to the Legislature. *People v Ramsey*, 422 Mich 500; 375 NW2d 297 (1985).

440 Mich at 493-494.

While at first blush this ruling might appear to preclude any argument that the limitation in MCL 257.626(5) to jury trials is beyond the legitimate authority of the Legislature, in that it impacts on a defendant's decision whether to seek to waive a jury trial, the *Kirby* decision should not be so broadly applied. It is one thing to hold that conditioning a defense waiver of the constitutional right to jury trial on prosecutorial consent is within the power of the Legislature, even though the prosecution may elect to withhold that consent in a particular case due to its perception of the predilections of the specific trial judge in the case. In such a case, however, the trial judge would have been proceeding based on the same legal principles and options open to the jury, and must be presumed to have been obligated to follow those legal principles regardless of the individual views of that judge. It is quite another thing where the choice between a jury trial and a bench trial not only changes the identity of the fact finder, but also the law applicable to that trial. Under MCL 257.626(5), a prosecutorial decision on whether to consent to a proposed waiver of a jury trial becomes a significantly different tactical decision than just a consideration of the particular judge – it instead involves the fundamental question of what verdicts are available in the case. Accordingly, the prosecution has a strategic advantage in each case in alone deciding whether to open up the potential of a guilty verdict on the necessarily included offense of moving violation causing death, or restrict the trial to an "all or nothing"

verdict on reckless driving causing death. That decision will not rest entirely on the particular judge, as may a general decision under MCL 763.3 on whether to consent to a bench trial, but also on the particular facts and evidence in the case. Regardless of the identity of the trial judge, sitting as trier of fact at a bench trial, the prosecution can make a strategic decision, based on the strengths or weaknesses of its own case, to allow or disallow a possible conviction only on the lesser offense. The defense has no such absolute strategic power.[9]

The prosecution's undue strategic advantage in being able to bar a bench trial where a defendant is charged with reckless driving causing death, and thus prevent any possibility of a guilty verdict only on the lesser offense of moving violation causing death, is similar to the equally unfair tactical advantage the prosecution has in regards to consideration of other lesser offenses. It is clear that prosecutors can and do circumvent the decision of this Court in *People v Cornell*, 466 Mich 335 (2002), which bars a trial judge from instructing a jury, pursuant to a request during trial from either the defense and/or the prosecution, on a cognate included offense as an alternative conviction under a charged offense.

If the prosecution wants to have the jury able to consider convicting a defendant on a cognate lesser offense, they can get that cognate charge in front of the jury, creating the possibility of a conviction on either or both the cognate and the greater charge, by separately

[9] Amicus of course recognizes that the prosecution cannot force an unwilling defendant into a bench trial rather than a jury trial, and the choice to seek waiver of the right to jury trial remains only with the defense. Obviously, a particular defendant may conclude it would be strategically advantageous to have a bench trial rather than a jury trial, or vice versa, depending on the case. However, only the prosecution has the power, under these statutes, to preclude the other side's wish to waive the jury. Thus, while the defense can insist on a jury trial, only the prosecution can preclude a bench trial, even if the trial judge would have agreed to the waiver.

charging the cognate offense.[10] By this discretionary and voluntary charging decision, the prosecution will negate the *Cornell* ban on requesting instruction on a cognate offense as a lesser included offense alternative. However, if the prosecution does not want, in a particular case,[11] for the jury to have the option to convict the defendant only on the cognate offense, they can decide not to separately charge that cognate offense, and thus rely on the *Cornell* rule to bar the defense from receiving any instruction on the cognate. Accordingly, due to its exclusive power to bring charges, the prosecution can decide, for strategic reasons, whether or not the *Cornell* rule will be applicable in the particular case. The defense, of course, has no such opportunity to circumvent the rule, and is always bound by *Cornell's* ban on cognate offense instructions.

Similarly, in a prosecution under MCL 257.626(4), if the defendant, seeking to acknowledge that he or she is guilty of committing a moving violation causing death under 257.601d(1) but asserting there was no reckless driving, would seek to waive his or her right to a jury trial in order to avoid the bar under 626(5) on jury instructions on the lesser offense and have the trial judge sitting as trier of fact consider this defense theory. The prosecution, as set forth above, has the absolute power to preclude presentation of that defense theory by refusing to consent to a bench trial, thereby limiting the options to either reckless driving causing death or not guilty. On the other hand, in order to have such a defense theory considered, a defendant has to give up the constitutional right to a jury trial, and hope the prosecution consents. That waiver

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[10] In *People v Cornell, supra*, this Court held that a cognate lesser offense is not the "same offense" as the charged offense, under the double jeopardy protections of the Fifth Amendment or art 1, sec 15 of the Michigan Constitution, and thus it is permissible for guilty verdicts on both the charged offense and any cognate offense to stand. See, for example, *People v Ream*, 481 Mich 223 (2008).

[11] For example, where the defense would want to argue that the accused is guilty only of the cognate lesser offense, but not of the more serious charged offense. In such a case, the prosecution may wish, for strategic reasons, to require the jury to render an "all-or-nothing" verdict on the charged offense, in hopes that the jurors will not acquit a defendant who admits to engaging in some criminal conduct.

of the fundamental right to a jury trial, while knowing, is not voluntary or freely made, if premised on the different law applicable to jury versus bench trials.

In *People v Binder*, 215 Mich App 30 (1996), the Court of Appeals held that MCL 768.32(2), which restricts the lesser included offenses available in major controlled substance prosecutions, was an unconstitutional intrusion on the separation of powers doctrine. On review, this Court vacated that portion of the Court of Appeals' opinion on the basis the ruling was not necessary in light of the Court of Appeals' further conclusion that the error in the case was harmless. *People v Bincer*, 453 Mich 915 (1996). This Court has not subsequently ruled on the constitutionality of 768.32(2).

Even if it is assumed, for the sake of argument, that a majority of this Court, when faced with that precise question, would find that 768.32(2) is a valid exercise of the Legislature's authority under the Michigan Constitution, that ruling would not automatically uphold the validity of MCL 257.626(5) as well. As indicated above, the restriction of 768.32(2) expressly applies to both jury and bench trials, and thus the strategic advantage issue discussed herein would be neither relevant nor applicable to that statute. Even if the Legislature is found to have the authority to create specific and individualized exceptions to the general rule of 768.32(1), those exceptions should apply to **all** trials in order to eliminate any preferential and unfair strategic advantage to one party.

This Court does not have the authority to rewrite MCL 257.626(5) to apply that restriction, if otherwise found to be within the constitutional authority of the Legislature, to expand the restriction to bench trials. The statute as written should be held to impermissibly restrict and burden a defendant's right to jury trial, and to unduly influence and taint the decision to seek to waive that fundamental constitutional right. The statute should be invalidated.

SUMMARY AND RELIEF SOUGHT

Amicus asks this Honorable Court to affirm the decision of the Court of Appeals below.

Respectfully submitted,

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